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No. 84-105

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MARTIN FINE, *et al.*,

Petitioners,

v.

BELLEFONTE UNDERWRITERS INSURANCE CO., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUT

MOTION AND BRIEF OF THE MUNICIPAL ART SOCIETY OF NEW YORK, *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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August 22, 1984

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MOTION OF THE MUNICIPAL ART SOCIETY OF NEW YORK FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The Municipal Art Society of New York hereby moves pursuant to Rules 36.1 and 42 of this Court for leave to file a brief as *amicus curiae* urging the Court to issue a writ of certiorari to the United States Court of Appeals for the Second Circuit and, under the Court's supervisory powers, to reverse and remand for reconsideration in light of controlling decisions of the Court of Appeals of the State of New York. This motion is necessitated by the refusal of respondents to consent to the filing of the Society's brief.

Founded in 1892, The Municipal Art Society of New York is dedicated to the preservation and improvement of the urban landscape in New York City. The Society sponsored the enactment of the first zoning code in the City of New York in 1916, and sponsored the enactment of its first landmarks law in 1965. The Society provides a forum for public debate on a broad range of urban issues, takes advocacy positions on many of these issues, and files briefs before courts of appellate jurisdiction, particularly in cases which raise significant questions of law relating to preservation of historic or landmark structures.

The Society believes that the decision of the Second Circuit, which rejects the controlling criteria of the New York courts for sustaining insurance coverage after fire in a building, is likely to result in the denial of coverage to older, marginal buildings for reasons unrelated to the actual cause of the fire. Proceeds that could be used for restoration may be denied altogether, or for a significant period, as the insurance carrier tries to find a way through the much larger escape hatch created by the Second Circuit.

The Municipal Art Society of New York believes the decision below was erroneous for the reasons set forth in the accompanying brief, and respectfully prays that the Court grant this motion for leave to file its brief.

Respectfully submitted,

/s/ PHILIP K. HOWARD

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The Municipal Art Society of New York submits this brief on an issue of importance to the preservation of historic and landmark buildings.

Summary of Argument

The opinion of the Second Circuit Court of Appeals conflicts with a recent decision of the highest Court of New York interpreting the New York Insurance Law. In so doing, the Second Circuit's opinion encourages insurance companies to search for or induce false but immaterial statements regarding buildings damaged by fire, with the

goal of denying coverage. The Second Circuit's new standard is a particular threat to older structures, including landmarks, the restoration of which after a fire may depend entirely upon the availability of insurance.

Argument

On February 14, 1979, a fire destroyed the interiors, but not the facades, of 3 distinguished buildings on lower Broadway in Manhattan. In the ensuing investigation by the insurance company into the cause, representatives of the owner made false statements concerning their maintenance of the properties. Respondent insurance carrier refused coverage under the "Fraud, Concealment" clause of § 168 of New York Insurance Law (McKinney 1966 and Supp. 1983), and the owners sued.

After bench trial, the District Court refused to find that the faulty maintenance was the cause of the fire, or that the false statements were made with an intent to defraud the insurance company (A16-17, A21). The District Court consequently awarded judgment to the plaintiffs.

The Second Circuit, creating a new interpretation of New York Insurance Law § 168, reversed. The court held that the insurance company could void coverage if an agent or employee of the owner makes any false statement to an investigator after the fire, whether or not material to the cause of the fire and whether or not made with intent to defraud (B8-12).

The Second Circuit's decision squarely conflicts with a recent decision of New York's highest court, *Jonari Management Corp.* v. *St. Paul Fire and Marine Ins. Co.*, 58 N.Y.2d 408, 416-17, 461 N.Y.S.2d 760, 764, 448 N.E.2d 427, 431 (1983), which reaffirmed the common law rule

that a carrier may void coverage for false statements made in the course of an investigation only upon proof of "intent to defraud" and not for "proof of misrepresentation alone." This distinction is a product of the common law, and the Second Circuit's refusal to acknowledge it has significant and adverse practical consequences.

Under the Second Circuit's rule of New York Insurance Law, insurance companies now have an incentive to interrogate the insured's employees with a view, not simply to find the cause of fire, but to induce false statements, however irrelevant to the fire (e.g., whether paint cans were properly covered). The interrogation by insurance investigators of building employees may often lead to defensive, false answers by the employee, and, when this occurs, coverage will be voided whether or not the false statement was material, in fact or intent, to the actual cause of the fire.

Many landmark buildings, precisely because of age, often have marginal economic status in the local economy. Their budgets and upkeep will reflect this status. The owners, tenants, and employees may not be of a quality or integrity that we or society would hope for these structures. The traditional rule, however—and the clear rule in New York—is that these buildings should not be denied insurance coverage unless the lack of care actually caused the fire or, in the case of false statement, was intended to defraud the insurance company as to the actual cause of the fire. As there were no such findings here, the Second Circuit's decision erroneously applied the law of New York and should be reversed. *See Erie R.R. Co.* v. *Tompkins,* 304 U.S. 64 (1938).

Conclusion

For the reasons stated, the Municipal Art Society of New York urges the Court to issue a writ of certiorari to the Second Circuit Court of Appeals, and suggests that the Court, under its supervisory powers, consider summarily reversing and remanding the decision for further proceedings consistent with the decisions of the courts of New York.

Respectfully submitted,

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